IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 7492

ALLIE E. LEWIS AND WILLIAM LLOYD LEWIS,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA, *Defendant in Error.*

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

PETITION *for* REHEARING.

The plaintiffs in error, Allie E. Lewis and William Lloyd Lewis, respectfully ask the court for a rehearing in this cause, and that the opinion of the court entered on December 3, 1927, be set aside and vacated and the judgment of the District Court for the Eastern District of Oklahoma be set aside and the indictment against the plaintiffs in error ordered dismissed, and for grounds and reasons therefor, the plaintiffs in error respectfully represent to the court: *(1)* That this court, in its opinion, has misstated the facts as they actually exist and are shown in the record and has evidently failed to grasp and fully comprehend the grounds urged against the jurisdiction of the court for the new Eastern District of Oklahoma to *indict* or *try* the plaintiffs in er-

ror. *(2)* That the opinion of the court is in irreconcilable conflict with a prior decision of this court in the case of *Case* v. *United States*, 14 Fed. (2nd Series), 510. *(3)* That the court, in its opinion, has misconstrued the Sixth Amendment to the Constitution of the United States, section 59 of the Judicial Code, and the Act of February 16, 1925, and failed to make proper application thereof to the uncontroverted facts actually existing and shown in the record. *(4)* That the court has misconstrued the words "entry" and "book" as used in section 5209. *(5)* That the court has erred in holding the evidence is sufficient to sustain the conviction on the last three counts of the indictment.

I.

The court, in its opinion, says:

> "August 5, 1925, the defendants filed an affidavit of prejudice against Judge KENNAMER, and moved for an order of disqualification, and an authenticated copy thereof to be certified to the Senior Circuit Judge of the Circuit; this motion was overruled, *the case proceeded to trial before Judge Kennamer and resulted in a judgment of conviction. This judgment was reversed and remanded by this court upon the ground that the trial judge erred in refusing to disqualify himself upon the application made. Lewis, et al.*, v. *United States, 14 Fed. (2d. Series), 369. Thereafter, Judge Pollock was designated under the provisions of the Judicial Code. The case was tried at Ardmore in the Eastern District. From the judgment of conviction resulting, the case comes again to this court on error.*"

The court has confused the instant case with an entirely different case against the plaintiffs in error, which was reversed by this court in *Lewis* v. *United States*, 14 Fed. (2nd Series) 369. *These two cases are not the same case, but are*

separate and distinct prosecutions. This is the first time the instant case has been in the Circuit Court of Appeals. Judge Kennamer did not try this case on the merits in the court below and there has been but one conviction in this case and that was before Judge Pollock at Ardmore in the court for the new Eastern District.

The indictment in the case of *Lewis* v. *United States*, reported in 14 Fed. (2nd Series) 369, was found and returned in the United States court for the first division of the old Eastern District, on October 9, 1924, several months before the Act of Congress of February 16, 1925, was passed, and contained twenty-three counts, one for conspiracy, twenty for wilful misapplications and two for making false entries in reports to the comptroller of the currency. That case was tried at Muskogee before Judge KENNAMER in August, 1925, resulting in a conviction, from which an appeal was taken to the Circuit Court of Appeals, and the case was reversed by the Circuit Court of Appeals on the ground that Judge KENNAMER was disqualified by the filing of an affidavit of personal bias and prejudice on August 5, 1925. In that case, Judge KENNAMER made on order entered of record, that the petit jurors should be drawn from twenty certain particular counties named in the order.

In the instant case, the indictment was found and returned at Muskogee in the court for the *new Eastern District* of Oklahoma on June 23, 1925, several months after the passage of the Act of Congress of February 16, 1925, and after the organization of the court for the Northern District, which took place on April 1st, 1925, and contained forty counts, the first thirty-seven for making false entries in a certain minute book of the Liberty National Bank and the last

three for making false entries in certain reports to the comptroller of the currency. An affidavit of personal bias and prejudice was also filed against Judge KENNAMER in the instant case, which he overruled, but he did not try the instant case on the merits, although he did, before the filing of the affidavit of personal bias and prejudice, rule *at Muskogee in the court for the new Eastern District* of Oklahoma, on the motion to dismiss for want of jurisdiction, the motion to quash and plea in abatement and the demurrer to the indictment. This case remained in abeyance until the early part of the year 1926, when it was tried before Judge POLLOCK at Ardmore in the court for the new Eastern District. No order of court was ever made or entered of record in this case directing the drawing of the grand jury or the petit jury from any particular part of the new Eastern or the old Eastern District and no order of court was made by Judge KENNAMER or anyone else assigning this case for trial at Ardmore, Oklahoma, instead of Tulsa, Oklahoma. The case was tried at Ardmore in the court for the *new Eastern District* of Oklahoma at the regular October, 1925, term of said court resulting in a conviction, from which this appeal has been prosecuted. It is plainly and patently clear, therefore, that the case reported in 14 Fed. (2nd Series) 369, is not the same case as that before this court now and the jurisdictional questions involved are not the same. In the first case, there was no question raised as to the jurisdiction of the court to return the indictment, it having been found and returned prior to the passage of the Act of February 16, 1925, and was then pending for trial at Tulsa, Oklahoma, in the second division of the old Eastern District. While it is true we did raise, in that case, the question of the jurisdiction of the court for the *new Eastern District* to try the plaintiffs in er-

ror on that indictment, we conceded, in fact, contended, that the court for the second division of the old Eastern District, had full and complete jurisdiction to try the plaintiffs in error on that indictment at Tulsa in the second division of the old Eastern District and since the Circuit Court of Appeals reversed the case on the ground that Judge KENNAMER was disqualified upon the filing of the affidavit of personal bias and prejudice, the way is open for the Government yet to try the plaintiffs in error on that indictment in the proper court and venue.

This court, in its opinion in the instant case, says:

> "The judge of the Eastern District, before the passage of the Act of February 16, 1925, by *general order*, directed the names of jurors from the ten transferred counties to be removed from the jury boxes for the Eastern District, thereby, in effect restricting the drawing of the jurors to the counties remaining in the district."

This is an erroneous statement, because the judge of the Eastern District, neither before nor after the passage of the Act of February 16, 1925, made any order, either general or special, directing the names of jurors for the ten transferred counties, including Tulsa County, to be removed from the jury box for the Eastern District. The Government, in its brief in this case, did assert that after the organization of the court for the Northern District, and before the drawing of the grand jury that returned the indictment in this case, Judge WILLIAMS gave verbal directions to his clerk, at the request of the district attorney, to delete the jury box of the old Eastern District of all names for the ten counties of the old Eastern District which were not then a part of the new Eastern District, for the purpose of constituting a legal jury box for the court of the new Eastern District, but it is not

contended by the Government that any order to that effect was ever made and entered of record, and the record shows affirmatively that such an order was not made or entered.

It is gravely important that this court should keep clearly in mind a true and correct statement of the facts, to which the law is applied, which facts should be simply, clearly and *correctly* set out in the court's opinion, and the court, we feel confident, will correct these misstatements in its opinion, after they have been called to its attention.

II.

The opinion of the court in this case is in direct conflict with the case of *Case* v. *United States*, 14 Fed. (2nd Series) 510, decided by this court on August 13, 1926, in which Circuit Judge Sanborn and District Judges Woodrough and Scott participated.

In *Case* v. *United States, supra*, the division order made by Judge Sanborn on July 23, 1924, dividing the old Eastern District into two divisions was carefully considered and construed by this court. In that case, the offense was committed in Muskogee County, Oklahoma, on November 17, 1924, and the defendants had been indicted before and the case was pending in the old Eastern District on February 16, 1925, when the Act of Congress of that date became effective, creating the present three new and independent judicial districts in Oklahoma. The case was tried at Tulsa, Oklahoma, on the 13th day of March, 1925, before Judge Kennamer, the plaintiff in error in that case contending that he could not have been tried on March 13, 1925, on the charge preferred against him elsewhere than at Muskogee, Oklahoma, before the Honorable R. L. Williams, because under the division order of Judge Sanborn above referred to, and the Act of Con-

gress of February 16, 1925, the case had been exclusively assigned for trial *at Muskogee,* before Honorable R. L. Williams. The Circuit Court approved such contention and said:

> "Afterwards, and on the 16th day of February, 1925, the President approved an Act (32 Statute 945, ... (Compiled Statute, SS. 1088, 1088-E)), which in its effect ratifies and confirms the above order made by Judge Sanborn * * *."

And the court also said:

> "It thus appears that at the time of the commission of the offense charged, as well as at the time of the trial, *the place of the trial* of the offense had been ascertained and fixed at Muskogee in the County of Muskogee, and the Senior Judge of the original Eastern District, Hon. Robert L. Williams, had been designated and assigned as the judge to preside at such trial, and the Junior Judge, Hon. F. E. Kennamer, had been specifically excluded from that function, the word 'exclusive' twice used in the order being capable of no other construction.";

and that:

> "After the order for division of business was made, and certainly after the Act of Congress confirming the order was passed, the ascertainment by law of the *place of trial* for the offense with which this petitioner was charged, was definitely settled. It was so settled previous to his trial, and the attempt to try him *at another and different place* by a judge who had been specifically excluded from the function, was not a mere irregularity, but wholly without lawful authority."

And also that:

> "The proceedings here disclosed, being in contravention of the order and the Act of Congress, were clearly void and the petitioner for writ of *habeas corpus* was deprived of his liberty without authority of law."

The offenses charged in the instant case are alleged to have been committed in Tulsa, Oklahoma, in the year 1923. The indictment was found and returned on June 23, 1925, after the Act of Congress of February 16, 1925, had taken effect and after the court for the Northern District of Oklahoma had been organized.

This division order of Judge SANBORN, which has been approved and ratified by Congress in the Act of February 16, 1925, operated to assign the instant case for trial at Tulsa, in the second division of the old Eastern District, because the offense is alleged to have been committed in Tulsa County before the Act of February 16, 1925, was passed. This division order further provided that:

> "But the argument of *law questions* and the trial of criminal cases on *motions, demurrers, and pleas, shall be had in the division in which the offense is charged to have been committed* and before the judge to whom the judicial work of that division is generally assigned."

Judge KENNAMER ruled on the motion to dismiss, the motion to quash and the demurrer *at Muskogee*, as the assigned judge of the court for the new Eastern District of Oklahoma. Muskogee is located in the first division of the old Eastern District, whereas the offenses charged in this case are alleged to have been committed at Tulsa, which is in the second division of the old Eastern District. It, therefore, follows, under the ruling in *Case* v. *United States, supra*, that the trial of motions and demurrers in criminal cases arising before the passage of the Act of Congress of February 16, 1925, must be had in the division in which the offenses are alleged to have been committed, that the motions and demurrer in this case should have been ruled on in the second division of the old Eastern District at Tulsa and not at Muskogee, which is

outside of said division of said district. This was a jurisdictional matter and Judge KENNAMER had no more authority to rule on these questions at Muskogee than he would have had to rule on them at Little Rock, Arkansas, if he had been assigned to the Eastern District of Arkansas.

This division order also provided:

> "It is further ordered that unless and until otherwise ordered by the judge to whom the judicial work of the division in which any county is situated, the cases and issues arising in, or coming from, such county, shall be, and are hereby, assigned for hearing and trial, to the court town to which such county is heretofore in this order declared tributary."

It is provided in the earlier part of this division order that cases and issues arising in, or coming from, Tulsa County are tributary to the court at Tulsa, Oklahoma. The record in this case shows that no order was made by Judge KENNAMER or any other judge, assigning this case, or any issues arising therein, for trial at Ardmore, Oklahoma, or any place other than Tulsa, as provided in the division order. It follows, therefore, under the authority of *Case* v. *United States*, that the rulings on the motions and demurrer and the trial of the case should have been had *at Tulsa*, in the second division of the old Eastern District of Oklahoma, whereas, in fact, it is conclusively shown in the record that the motions and the demurrer were ruled on by Judge KENNAMER *at Muskogee*, entirely outside of the second division of the old Eastern District, and the trial of the case on its merits was had *at Ardmore, Oklahoma, instead of Tulsa, Oklahoma*. The division order of Judge SANBORN, ratified and approved by Congress in the Act of February 16, 1925, having definitely fixed *the place* for exercising these functions by the court having juris-

diction to act, and this court having held, in *Case* v. *United States* that this was jurisdictional, it follows that the rulings of Judge KENNAMER *on the motions and demurrer at Muskogee* and the conviction of the plaintiffs in error before Judge POLLOCK *at Ardmore*, were without authority and null and void.

III.

The court, in its opinion, has failed to make the proper application of the Sixth Amendment to the Constitution of the United States, section 59 of the Judicial Code, and the provisions of the Act of February 16, 1925, to the uncontroverted facts actually existing and shown in the record. The court, in its opinion, says:

> "There were originally two judicial districts in the State of Oklahoma—the Eastern and Western. The judges of the Eastern District were the Hon. R. L. WILLIAMS and the Hon. F. E. KENNAMER. * * * An Act of Congress approved February 16, 1925, created three independent districts in the State of Oklahoma, designated as the Eastern, Western and Northern. The said newly created Northern District comprises ten counties which were formerly a part of the old Eastern District and two counties which were formerly a part of the old Western District. The new Eastern District comprises the remaining counties of the old Eastern District and the new Western District comprises the remaining counties of the old Western District."

It is uncontroverted that the plaintiffs in error were indicted in the court of the *new Eastern District* by a grand jury drawn and impaneled exclusively from the territory now embraced in the *new Eastern District* and they were tried and convicted in the court of the *new Eastern District*, before a petit jury drawn and impaneled exclusively from the

territory now embraced within the *new Eastern District.* By affirming the conviction in this case, this court holds: That the new Eastern District is the same identical district as the old Eastern District, although the territory embraced therein does not include ten counties, of which Tulsa County is one, which are included in the old Eastern District. By the same token, this court holds that the court for the new Eastern District is the same identical court as the court for the old Eastern District, although the court for the new Eastern District has one judge and no divisions, whereas, the court for the old Eastern District has two judges, two divisions and may sit at places outside the territorial jurisdiction of the court for the new Eastern District, and where the court for the new Eastern District cannot exercise its functions. By the same token, it holds that the court for the new Eastern District, which indicted and tried the plaintiffs in error, was without power or authority to summon grand or petit jurors from ten counties, including Tulsa County, where the offense was committed, which were a part of the vicinage from which the plaintiffs in error were entitled to have both grand and petit jurors drawn, if the court should determine that the drawing from those counties would be most favorable to an impartial trial and would not incur an unnecessary expense or unduly burden the citizens with such service.

This holding of the court is violative of the uncontroverted facts and the admitted law. The new Eastern District does not have the same identity as the old Eastern District, and the two are not the same in fact. The identity of a judicial district is determined solely and alone by its territorial boundaries and one judicial district differs from any other judicial district solely in its territorial confines. There can be no other difference between different judicial districts. The

new Eastern District has within its territorial boundaries thirty counties. The old Eastern District has within its territorial boundaries forty counties. The fact that the two districts have thirty counties in common cannot, in the very nature of things, make them the same district, or give them the same identity. Especially is this true when they are considered in reference to jurisdiction over an offense committed in a county which is within the territorial boundaries of one district, but is without the territorial boundaries of the other district.

The fact that the new Eastern District and the old Eastern District are designated and referred to in the Act of February 16, 1925, as the Eastern District, has given rise to some confusion, although the language of the act itself very plainly shows that Congress had in mind the separate identity of the two districts and their courts and specifically preserved their separate identity in the act itself. That act provides:

> "*Sec. 2.* The present Senior Judge of the Eastern District of Oklahoma be, and he is hereby, assigned to hold said court in the said Eastern District and shall exercise the same jurisdiction and perform the same duties within the *said* district, as he exercised and performed within *his* district prior to the passage of this act. That the present judge of the Western District of Oklahoma be, and he is hereby assigned to hold said court in the Western District of Oklahoma, and shall exercise the same jurisdiction and perform the same duties as he exercised and performed within *his* district prior to the passage of this act. That the present Junior Judge of the Eastern District of Oklahoma be, and he is hereby, assigned to hold said court in the said Northern District, and shall exercise the same jurisdiction and perform the same duties within the *said* district as he exercised and performed within *his* district prior to the passage of this

act. Each of said judges and courts shall in all other respects have all the power and authority, civil, criminal, equitable or otherwise, which is conferred by law generally upon the District Courts of the United States and the judges thereof.";

and,

"*Sec. 5.* The jurisdiction and authority of the courts and officers of the Western District of Oklahoma and of the courts and officers of the Eastern District of Oklahoma as heretofore divided between them by the order of the senior judge of the Circuit Court of Appeals for the Eighth Circuit of the United States over the territory embraced within the said Northern District of Oklahoma, shall continue as heretofore until the organization of the District Court of said Northern District, *and thereupon shall cease and determine,* save and except insofar as the authority of the junior judge of said Eastern District is continued in him as judge of said Northern District and save and except as to the authority expressly conferred by law on said courts, judges or officers, or any of them, to commence and proceed with the prosecution of crimes and offenses committed therein prior to the establishment of the said Northern District and save and except as to any other authority expressly reserved to them or any of them, under any law applicable in the case of the creation or change of the divisions or districts of District Courts of the United States."

The use of different words qualifying "District" in section 2 above quoted and the provision in section 5 above quoted providing for the cessation and termination of the jurisdiction and authority of the old courts and their officers upon the organization of the court for the Northern District, except to commence and proceed with the prosecution of crimes and offenses committed prior to the establishment of said Northern District, clearly recognizes the separate identity of the new Eastern District and the old Eastern Dis-

trict and the separate identity of the court for the old Eastern District and the court for the new Eastern District. This can be made to clearly stand out to the mind through an appeal to the sense of sight, by using the word "Southern" to designate the new Eastern District in the act wherever the word "Eastern" is used to designate the new Eastern District. Thus substituted, these provisions of the Act of February 16, 1925, would read as follows:

"*Section 1.* The State of Oklahoma is divided into three judicial districts, to be known as the Northern, Southern and Western Districts of Oklahoma. The territory embraced on January 1st, 1925, in the counties of Craig, Creek, Delaware, Mayes, Nowata, Okfuskee, Osage, Ottawa, Pawnee, Rogers, Tulsa and Washington as they existed on said date shall constitute the Northern District of Oklahoma. Terms of the United States District Court for the Northern District of Oklahoma shall be held at Tulsa on the first Monday in January; at Vinita on the first Monday in March; at Pawhuska on the first Monday in May and at Bartlesville on the first Monday in June each year; provided that suitable rooms and accommodations for holding court at Pawhuska and Bartlesville are furnished free of expense to the United States.

"The Southern District of Oklahoma shall include the territory embraced on January 1st, 1925, in the counties of Adair, Atoka, Bryan, Cherokee, Choctaw, Coal, Carter, Garvin, Grady, Haskell, Hughes, Johnston, Jefferson, Latimer, Le Flore, Love, McClain, Muskogee, McIntosh, McCurtain, Murray, Marshall, Okmulgee, Pittsburg, Pushmataha, Pontotoc, Seminole, Stephens, Sequoyah and Wagoner. Terms of the District Court for the Southern District shall be held at Muskogee on the first Monday in January; at Ada on the first Monday in March; at Okmulgee on the first Monday in April; at Hugo on the second Monday in May; at South McAlester on the first Monday in June; at Ardmore on the first

Monday in October; at Chickasha on the first Monday in November; at Poteau on the first Monday in December each year and annually at Pauls Valley at such times as may be fixed by the judge of the Southern District; provided that suitable rooms and accommodations for holding said court at Hugo, Poteau, Ada, Okmulgee and Pauls Vallley are furnished free of expense to the United States.

"The Western District of Oklahoma shall include the territory embraced on the 1st day of January, 1925, in the counties of Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods and Woodward. The terms of the District Court for the Western District shall be held at Guthrie on the first Monday in January; at Oklahoma City on the first Monday in March; at Mangum on the first Monday in April; at Enid on the first Monday in June; at Lawton on the first Monday in September, and at Woodward on the first Monday in November in each year, provided, that suitable rooms and accommodations for holding court at Mangum and Woodward are furnished free of expense to the United States. The clerk of the District Court for the Northern District shall keep his office at Tulsa. The clerk of the District Court for the Southern District shall keep his office at Muskogee and shall maintain an office in charge of a deputy at Ardmore. The clerk for the Western District shall keep his office at Guthrie and shall maintain an office in charge of himself or his deputy at Oklahoma City."

"*Section 2.* The present senior judge of the Eastern District of Oklahoma be, and he is hereby assigned to hold said court in the said Southern District and shall exercise the same jurisdiction and perform the same duties within the said Southern District as he exercised

and performed within his district prior to the passage of this act. That the present judge of the Western District of Oklahoma be, and he is hereby assigned, to hold said court in the Western District of Oklahoma, and shall exercise the same jurisdiction and perform the same duties as he exercised and performed within his district prior to the passage of this act. That the present junior judge of the Eastern District of Oklahoma be, and he is hereby assigned, to hold said court in the said Northern District, and shall exercise the same jurisdiction and perform the same duties within said District as he exercised and performed within his district prior to the passage of this act. Each of said judges and courts shall in other respects have all the power and authority, civil, criminal, equitable or otherwise, which is conferred by law generally upon the District Courts of the United States and the judges thereof."

Under section 1 of the Act, Congress created the three new and independent judicial districts without reference to the previously existing districts and designated the territorial boundaries of each, fixed the times and places for holding regular terms of the court of each district and prescribed the places at which the clerk of each district should keep his office. This is an original creation by legislative enactment of three new and independent judicial districts and the courts therefor. It is not a recognition of the previous existence and future continuation of any old districts or courts. It is not a transfer of territory from a previously existing district to another previously existing district or to a new district.

Section 2 of the act provides a judge for each new district created by the act by assigning Judge WILLIAMS to the new Eastern District, Judge KENNAMER to the new Northern District and Judge COTTERAL to the new Western District and provides that each of said judges so assigned shall exercise

the same jurisdiction and perform the same duties in the new district to which he is assigned as he exercised and performed in the old district of which he was judge prior to the passage of the act, and that each of said judges and courts should, in all other respects, have all of the power and authority, civil, criminal, equitable or otherwise which is conferred by law generally upon the District Courts of the United States and the judges thereof.

Having fully and completely created the three new and independent districts and provided a judge for each district, fixed the times and places for holding the regular terms of court of each district and the places where the clerks of the courts should keep their offices and fixed and prescribed the jurisdiction and authority of each court and judge thereof, the act then proceeds in section 5 to deal with the jurisdiction and authority of the old courts and their officers and provides that the jurisdiction and authority of the courts and officers of the Eastern District as theretofore divided between them by an order of the Senior Judge of the Circuit Court of Appeals for the Eighth Circuit over the territory embraced within the Northern District should continue as theretofore until the organization of the court for the Northern District, but thereupon, should cease and determine, save and except as to the authority expressly conferred by law on said courts, judges or officers or any of them, to commence and proceed with the prosecution of crimes and offenses committed therein prior to the establishment of the said Northern District. The jurisdiction and authority of the old courts and their officers in all other respects had been terminated and destroyed by the creation of the new districts and the new courts thereof. As to past offenses, the old courts and the old districts were preserved by section 5 of the act, with the

same powers and jurisdictions and with the same territorial boundaries as existed before the act was passed. The preservation of the old districts and the reservation of the jurisdiction of the old courts has always been regarded as *necessary*, in view of the Sixth Amendment, to the legal prosecution for offenses committed prior to the change. Before section 59 of the Judicial Code was adopted, each act changing the courts and districts contained a provision preserving the old districts and the jurisdiction of the old courts as to past offenses, and it was to avoid the necessity of incorporating such a provision in each act that caused Congress to enact section 59 of the Code.

The court for the new Eastern District is not the same court as that of the old Eastern District. Not only is this so in the very nature of things, but the separate identity and existence of the courts for the two districts is specifically preserved and provided for in section 5 of the Act of February 16, 1925. The court for the new Eastern District has but one judge and no divisions and may sit at places and at times in regular terms where and when the court for the old Eastern District cannot sit. The court for the old Eastern District has two judges, two divisions and may sit at places and at times in regular term where and when the court for the new Eastern District cannot sit. The court for the new Eastern District exercises jurisdiction over thirty counties and continues into the future from the date of its creation until destroyed by subsequent legislation. The court for the old Eastern District exercises jurisdiction over forty counties and does not continue into the future as theretofore for any purpose save and except over the territory embraced in the ten counties now in the Northern District for all purposes until the organization of the court for the North-

ern District and thereafter, only as to offenses committed prior to the taking effect of the Act of February 16, 1925, and that limited and restricted jurisdiction will cease and terminate when all necessity for its existence in commencing and proceeding with the prosecution of crimes and offenses committed prior to the taking effect of the Act of February 16, 1925, has passed. It may sit and exercise jurisdiction over ten counties over which the court for the new Eastern District has no jurisdiction.

It seems to us that this question of the identity of the districts and the identity of the courts thereof is not open to controversy. It is so plain that it must necessarily force conviction to the mind of all that the districts are not the same and that the courts are separate and distinct tribunals.

The word "court," as a mental conception, has been defined by the Supreme Court of the United States in the case of *Todd* v. *United States*, 158 U. S. 278, 39 L. ed. 982, as follows:

> "A court is not a judge, nor a judge a court. A judge is a public officer who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power by the proper officer or officers at a time and place appointed by law."

The United States District Court for the Southern Division of the Northern District of Alabama in the case of *In re Steele*, 156 Fed. 853, in discussing the meaning of the term, said:

> "The word 'court' originally meant only a yard, palace or garden and according to Cowell it meant 'the house were the King remained with his retinue; also a place where justice was administered.' Anderson's Law Dictionary. So, in early history, the court meant the

place where the King was domiciled because the King was actually the fountain and dispenser of justice. The earlier courts were merely assemblages in the court yard of the baron or of the King himself, by those whose duty it was to appear at stated times or upon summons. This idea of the place predominating as the designation of a court caused Blackstone to adopt Coke's definition that 'a court is a place where justice is judicially administered.' 3 Blackstone's Commentaries 24. Indeed, the Supreme Court of Alabama in *Ex parte Branch & Company*, 63 Alabama 384, adopted the definition that a court is 'a place where justice is judicially administered.' This definition has been held to be too narrow and the definition given by a majority of judicial decisions is: 'a court is a tribunal duly constituted and present at the time and place fixed by law for judicial investigation and determination of controversy.' 2 Century Dictionary, p. 1312; 8 A. and E. Enc. of Law, page 22."

For other authorities, see *United States* v. *Clark*, 25 Fed. Cases 441, Case No. 14804; *In re Terrell*, 52 Kan. 29, 39 Am. St. Rep. 327; *State* v. *La Blonde*, (Ohio) 140 N. E. 510; *Belford* v. *State*, (Ark.) 139 S. W. 953.

It seems from these authorities that the term court includes as a dominant element, the idea of place. That it is more than the judge who presides. It is a separate and distinct entity from the territory over which it may exercise its functions. It is an incorporeal thing—a tribunal—and includes the judge, the clerk or other proper officers, and the place and time authorized by law for the exercise of judicial functions.

We confess that we cannot comprehend the meaning of this court where it says in its opinion:

"A practical interpretation of the Act of Congress contemplated the continuance of the Eastern District of

Oklahoma, not as a stranger to the former district, but with new boundaries after the analogy of the transfer of a county or counties from districts in other cases."

The new Eastern District is the same as the old Eastern District, or it is not. They cannot be identical and at the same time separate and distinct. The fact that the new district is not a stranger to the old district is no argument that it has the same identity, and we submit that the court's analogy of the transfer of a county or counties from a pre-existing district does not strengthen or fortify the court's holding that the two districts are the same and that the courts thereof are identical, because there is an unbroken line of decisions, including *Lewis* v. *United States*, 14 Fed. (2nd Series) 369, which hold that where a county, or counties, are transferred from a pre-existing district to another pre-existing district or to a new district, the identity of the old district and the identity of the old District Court is preserved for the purpose of commencing and proceeding with the prosecution of crimes and offenses committed before the change.

—*United States* v. *Hackett*, 29 Fed. 848;
United States v. *Benson*, 31 Fed. 896;
Lewis v. *United States*, 14 Fed. (2nd Series) 369.

Prior to August 5, 1886, the State of California constituted one judicial district known as the District of California. On the above date, Congress divided California into two districts, one known as the Southern District of California and the other known as the Northern District of California. The act provided that:

"All offenses heretofore committed in the District of California, shall be prosecuted, tried and determined in the same manner and to all intents and purposes as if this act had not been passed."

After the Act of Congress took effect, the Government continued to indict and prosecute offenders in the court for the District of California for offenses committed prior to the 5th day of August, 1886. Offenses committed after August 5, 1886, were prosecuted in the court for the Southern District of California, or the court for the Northern District of California, depending upon the district in which the offense was committed, but as to offenses committed prior to August 5, 1886, the court for the old District of California was treated as if in existence and prosecutions had therein, summoning grand and petit juries from the entire territorial body of the old District of California.

In *United States* v. *Hackett*, 29 Fed. 848, the defendant was indicted in the court for the old District of California by a grand jury of that district for an offense committed prior to August 5, 1886, and the defendant was being prosecuted on said indictment in the court of the old District of California. The court, in that case, speaking through Judge Hoffman, held that the old District of California and the court thereof continued to exist after the re-districting act was passed and that offenses committed prior thereto could be prosecuted in the court for the old district, saying:

> "For the purpose of trying offenders who had been indicted or whose offenses had been committed before the passage of the act, it was *necessary* to keep alive the District Court of the District of California (the same observation applies to the Circuit Court) in order that a court might be organized and be in existence competent to call a jury from the body of the district where the crime was committed."

And,

> "Inasmuch as every offender has a right to be tried by a jury of the district in which the crime was commit-

ted, which district shall previously have been ascertained by law, it is plain that a jury of the Northern District could not try an offender who has committed a crime while the district comprised the whole state; neither could a jury of the Southern District try him."

And,

"The result is that the District Court for the District of California and the Circuit Court for the District of California may continue to sit and summon jurors from the whole district for the purpose of trying those offenders. We are, therefore, of the opinion that the course adopted, though anomalous and open to some inconvenience, is the only course to be adopted unless we are willing to say that all indictments pending in either court and all offenses committed before the passage of the act, must, the one be discontinued and fail for want of jurisdiction and the other fail because the act secures the impunity of offenders."

In *United States* v. *Benson*, 31 Fed. 896, the same doctrine is laid down in an opinion by Circuit Judge FIELD concurred in by Circuit Judge SAWYER and District Judge HOFFMAN. These two cases are cited and approved by this court in *Lewis* v. *United States*, 14 Fed. (2nd Series) 369.

There is no case to be found in the authorities holding that a prosecution can be commenced or proceeded with in the court of a district as it existed after a county in which the offense was committed has been transferred to another district. The only case that even tends in that direction is *United States* v. *Peuschel*, 116 Fed. 642, but an examination of that case discloses that three counties were detached from the Northern District of California, which was a previously existing district, and attached to the Southern District of California, which was also a previously existing district. The offense in that case was not committed in the transferred territory,

but was committed in the counties of Kern and Tulare, which were a part of the Southern District of California, both before and after the transfer of the counties of Inyo, Mariposa and Merced from the Northern District to the Southern District of California. The prosecution in that case was in the court for the Southern District of California and that court had power and jurisdiction to summon jurors from the uttermost limits of the Southern District of California as it existed at the time the offense was committed and the court held that its jurisdiction to try the defendant for an offense committed in Kern and Tulare counties was not affected by the fact that thereafter the counties of Inyo, Mariposa and Merced were transferred to the Southern District from the Northern District.

Under the Act of Congress of May 29, 1900, construed in the *Peuschel* case, *supra*, the Northern and Southern Districts of California were continued in existence indefinitely. The only change the act made, or purported to make, in the two districts was to take from the Northern and add to the Southern District an inconsiderable amount of territory, leaving both districts the same in all other respects and it is said in the *Peuschel* case that:

> "The fact that said provision was not so extended shows conclusively that in the opinion of Congress, the transfer of the three counties from one district to the other could not affect prosecutions for offenses theretofore committed, *except such as were committed in the transferred counties.*"

There is a very marked distinction between a case where the offense was committed in transferred territory and a case where the offense was committed in territory not transferred and there is also a marked distinction between a case

where the prosecution is in the court of the district to which the transferred territory has been added and a case where the prosecution is in a court of the district from which the transferred territory has been taken. To illustrate, we will draw the distinction with reference to the facts in the *Peuschel case*. There the offense was committed in a county not transferred, but which was in the Southern District of California, before the Act of May 29, 1900, was passed and was in said district after said act was passed. The Southern District of California, after the act was passed, contained all of the territory of the old Southern District, plus three counties transferred to it from the old Northern District. The court of the Southern District, therefore, after the passage of the act, had jurisdiction over all of the territory in the old Southern District and could summon both grand and petit jurors from any and every part of the territory of the old Southern District. If the offense had been committed in one of the transferred counties, the court of the new Southern District would not have had power or jurisdiction to summon jurors from every part of the district in which that county was situated at the time the offense was committed. Nor would the court for the new Northern District of California have jurisdiction to summon jurors from every part of the old Northern District, because three of the counties, including the one in which the offense was committed, would then be outside of the territorial jurisdiction of the court for the new Northern District. It would have been necessary, then, as provided in the Act of May 20, 1900, to preserve the old Northern District and the court thereof for the trial of offenses committed in the transferred territory prior to the change because that would be the only way in which there could be preserved a court organized and with power and

jurisdiction to summon jurors from every part of the old Northern District, and, as said in the *Peuschel* case, under such circumstances, prosecutions for offenses committed prior to the change would be affected. They would be controlled by the provision of the act reserving jurisdiction in the court of the old Northern District.

In the instant case, if the analogy of the court is applied, the offense was committed in Tulsa County, which is within the jurisdiction of the court of the old Eastern District and not within the jurisdiction of the court of the new Eastern District, but is now within the jurisdiction of the court of the Northern District, and, under the authority of the *Peuschel* case, *supra*, the offense having been committed in the transferred territory, the jurisdiction of the court for the new Eastern District would be affected by the transfer, and jurisdiction to indict and try the plaintiffs in error for the offenses charged would inhere in the court of the old Eastern District and not elsewhere and the court for the new Eastern District would have no jurisdiction to commence or proceed with the prosecution of the plaintiffs in error for the offenses charged.

Section 2 of article 3 of the Constitution of the United States, provides:

> "The trial of all crimes, except in cases of impeachment, shall be by a jury; and such trial shall be held in the state where the said crimes shall have been committed, but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

Under this provision, the only restriction as to the place of trial when committed in a state was that the trial should be held within the state. This was not a sufficient protec-

tion to the citizen, according to the view of many of the framers of the constitution, nor a sufficient designation of the vicinage from which juries should be drawn to indict and try citizens for crimes committed. It was contended that after a crime was committed, Congress might, for political, or other reasons, change or alter federal judicial districts and thus restrict or extend the vicinage from which grand and petit juries might be drawn for the trial of such offenses and thus endanger the cherished right of trial by jury, at the place where the crime was committed and before a jury of the immediate vicinage. So, shortly after the adoption of the Constitution, the Sixth Amendment was submitted and adopted. It provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state *and district* wherein the crime shall have been committed, which district shall have been previously ascertained by law."

This was one of those great provisions of personal right which were exacted by the American people as a condition to the adoption of the constitution itself. It was proposed to the legislatures of the several states by the first Congress on the 25th day of September, 1789, and was ratified by a sufficient number of states in that year and in the years immediately following.

The language "which district shall have been previously ascertained by law" means that the district must have been ascertained by law prior to the commission of the offense.

—*United States* v. *Maxon*, 5 Blatchford 360, 26 Fed. Cases 1220, Case No. 15748;

United States v. *Dawson*, 15 Howard 468, 14 L. ed. 775;

Cook v. *United States*, 138 U. S. 157, 34 L. ed. 906; *United States* v. *Greene*, 146 Fed. 776.

The Circuit Court for the Eastern District of New York in the *Maxon* case said:

> "The argument in support of the jurisdiction is, that if the district is ascertained by law before the trial, the amendment is sufficiently complied with. We think that this interpretation is not in accordance with the fair import of the terms of the provision; nor would it meet the grievance it was intended to remedy, *namely*, the formation of a district after the offense was committed, to suit the will or caprice of the lawmaking power. According to the very words of the amendment, there must be a speedy trial by an impartial jury of the state and district in which the crime was committed, which district (the one in which it was committed), shall have been previously ascertained by law, that is, *previous to the commission of the offense.*"

The decision in that case came on a motion to quash an indictment against John Maxon for grand larceny alleged to have been committed on the 31st day of December, 1883, in the Navy Yards at Brooklyn, New York. At that time, the Navy Yards were within the Southern District of New York. By an Act of February 25, 1885, 13 Stat. 468, the Eastern District of New York was established and such Navy Yard fell within its territorial limits and jurisdiction. The indictment was subsequently found in the District Court for the Eastern District and was transmitted to the Circuit Court for the Eastern District. The Circuit Court sustained the motion to quash and dismissed the indictment.

The Supreme Court of the United States in *Cook* v. *United States*, *supra*, had under consideration the effect of the provisions of the Sixth Amendment to the Constitution

on the question of venue, where the offense was committed in a territory of the United States, but not within the limits of any state, and the Supreme Court in that case said:

> "In respect to that clause of the Sixth Amendment declaring that the district shall have been previously ascertained by law, it need only be said that if those words import immunity from prosecution where the district is not ascertained by law before the commission of the offense, or that the accused can only be tried in the district in which the offense was committed (the district having been established when the offense was committed), the amendment has reference only to offenses against the United States committed within a state. *United States* v. *Dawson*, 56 U. S., 15 Howard 467, 487, 488 (14: 775, 783); *Jones* v. *United States*, 137 U. S. 202, 211, 212 (34: 691, 695). The second section of Art. 3 has provided, in respect to crimes committed in the states, that the trial by a jury should be had within the state where the crime was committed. The Sixth Amendment added the further guarantee in respect to the place of trial, that the district should have been previously ascertained by law, leaving the trial of offenses not committed within any state to be controlled by the second section of article 3."

The Supreme Court in the *Cook* case, in quoting from *United States* v. *Jackalow*, 56 U. S. 485, 17 L. ed. 225, said that:

> "So, in *United States* v. *Jackalow*, 66 U. S., 1 Black, 484, 486 (17: 225, 226); 'the crimes committed against the laws of the United States out of the limits of a state are not local, but may be tried at such place as Congress shall designate by law; but are local if committed within the state. They must then be tried in the district in which the offense was committed'."

In *United States* v. *Greene*, *supra*, the United States District Court for the Eastern Division of the Southern District

of Georgia, in construing the Sixth Amendment to the Constitution, said:

> "The term, 'previously ascertained by law,' necessarily imports previously to the commission of the crime, or at least to the accusation. Now, it will not be disputed that the offense charged against the prisoners, if offense it be, was committed before the creation of the Southwestern Division of the Southern District of Georgia, with provision for court at Valdosta. At that time, the Eastern Division of the district comprehended the counties from which the grand jurors who found the indictments under consideration were drawn. The district, as it then stood was, therefore, the district as it had been previously ascertained by law. It follows that since a large number of counties have been, subsequently to the alleged commission of the offense, withdrawn from the Eastern Division and comprehended in the Southwestern Division, the Eastern Division now at this time is not as it had been previously ascertained by law. It follows that this principle of our organic law, which is over and above all other laws, obliges the court to try the defendants in the district as it stood at the time the offense is alleged to have been committed. The obvious intention of the framers of the constitution was to create a vicinage for the court from which jurors must be drawn. The vicinage was the late Eastern Division of the Southern District of Georgia, but that vicinage had been impaired as we have seen, by an Act of Congress. Acts of Congress cannot impair the constitution or its effect. It follows, therefore, that as to these prisoners, the vicinage in which they are to be tried is the Eastern Division of the Southern District of Georgia, as it had been previously ascertained at the time the offense is alleged to have been committed."

In *United States* v. *Dawson*, *supra*, the defendant was indicted in the Circuit Court of the United States for the District of Arkansas for the murder of one Seaborn Hill, in the Indian

country west of the State of Arkansas. After the offense was committed and after the indictment was returned, but before the trial thereof, the State of Arkansas was divided by Congress into two districts, known as the Eastern District and the Western District of Arkansas. The Western District included nine of the western counties of Arkansas and the Indian country lying west of the state. The rest of the State of Arkansas constituted the Eastern District. The contention was made in that case that the United States court for the Eastern District of Arkansas had no jurisdiction because the offense was not committed in the Eastern District of Arkansas, but was committed in what, at the time of the trial, was the Western District of Arkansas, and at the time of the commission of the offense and returning of the indictment was the District of Arkansas. There were two opinions in the case, a majority opinion by Justice NELSON, and a dissenting opinion by Justice MCLEAN. The Supreme Court, in the majority opinion, held that the Sixth Amendment to the Constitution did not apply, because the offense was not committed *within the State of Arkansas*, but in the Indian country outside of the State of Arkansas and that the place of trial was ruled by section 2 of article 3 of the Constitution, but in discussing the matter, said:

> "It has been supposed that a provision in the Sixth Amendment of the Constitution of the United States has a bearing upon this question, which provides that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.' The argument is, that since the erection of the new district out of the nine western counties in the state, together with the Indian country, it is not

competent for the Circuit Court, in view of this amendment, to try the prisoners within the remaining portion of the old district, inasmuch as that amendment requires the district within which the offense is committed and the trial is to be had, must be ascertained and fixed previous to the commission of the offense. But it will be seen from the words of this amendment that it applies only to the case of offenses committed within the limits of a state; and whatever might be our conclusion, if this offense had been committed within the State of Arkansas, it is sufficient here to say, so far as it respects the objection, that the offense was committed out of its limit and within the Indian country."

Justice McLean, in his dissenting opinion, contended that even where the offense was committed without the limits of the state, the indictment and trial must be had in the district as it existed at the time the offense was committed. He said:

"As the state and district are connected by the copulative conjunction in this provision, the case before us is not technically within it. The crime is alleged to have been committed within the Indian country, which the district includes, but it is not within the state. But the case appears to me to be within the policy of the provision. Nine counties of the State of Arkansas are within the district and from which the jury to try the defendant might be summoned. This brings the case substantially within the above provision. *Had the place of the murder been within one of the above counties, the constitutional provisions must have governed the case.*"

And further on in the dissenting opinion, Judge McLean says:

"If tried in the Eastern District, the jury must have been summoned from that district and not from the district in which the offense was committed. The considerations in favor of the Western District as the legal

place of trial greatly outweigh, it seems to me, any that can arise in favor of the Eastern District."

In the case at bar, the offense is alleged to have been committed in Tulsa County in the State of Oklahoma. At the time of the commission of the offense, Tulsa County was in the second division of the old Eastern District. At the time the indictment was returned in the court for the new Eastern District at Muskogee, Oklahoma, Tulsa County was not within the territorial boundaries of the new Eastern District, but was within the territorial boundaries of the new Northern District of Oklahoma. Under the authorities cited, it seems most clear that indictment in this case must be found, and the trial had, in the court of the old Eastern District, by a grand jury and a petit jury of that district, as it was constituted and existed at the time the offense is alleged to have been committed. *This was not done.* The indictment was returned in the court for the *new Eastern District* of Oklahoma at Muskogee on June 23, 1925, by a grand jury drawn and impaneled exclusively from the territorial limits of the *new Eastern District, and it is conceded by the Government in this case that the court in which the indictment was returned and in which the trial was had, had no power, authority or jurisdiction to summon grand or petit jurors from the ten counties of the old Eastern District, which includes Tulsa County,* which, under the Act of February 16, 1925, are included in the Northern District of Oklahoma, and this court in *Lewis* v. *United States,* 14 Fed. (2nd Series) 369, said:

"If jurors from the counties transferred from the Eastern to the Northern District were to be selected, it would necessitate a writ of *venire facias* to the marshal for the Northern District for the marshal of the Eastern District has no power to execute it outside of his own

district. There is no statute authorizing jurors to be drawn for service out of the district of their residence."

If the plaintiffs in error had been indicted and tried in the court of the old Eastern District, as plainly required by the Sixth Amendment to the Constitution, section 59 of the Judicial Code, and the Act of Congress of February 16, 1925, the court would have had jurisdiction to summon both grand and petit jurors from the uttermost limits of the old Eastern District, including the ten counties referred to, and the marshal of the old Eastern District would have had power and authority to summon these jurors from every part of the territorial limits of the old Eastern District. This was specifically held in the case of *United States* v. *Hackett*, 29 Fed. 848, which is cited and approved by this court in *Lewis* v. *United States*, 14 Fed. (2nd Series) 369, wherein the Circuit Court for the Northern District of California said:

> "The result is that the District Court for the District of California and the Circuit Court for the District of California may continue to sit and summon jurors from the whole district for the purpose of trying those offenders."

This must necessarily be true because it would otherwise be violative of the Sixth Amendment of the Constitution and also violative of section 59 of the Judicial Code which provides that, in such case, the prosecution must be commenced and proceeded with the same as if such new district had not been created or such county or territory had not been transferred, and it would also be violative of the provisions of the Act of Congress of February 16, 1925, which provides that the jurisdiction and authority of the courts and officers of the Eastern District of Oklahoma, as theretofore divided between

them by the order of the Senior Judge of the Circuit Court of Appeals of the United States for the Eighth Circuit, shall continue for the purpose of commencing and proceeding with the prosecution of crimes and offenses committed therein prior to the passage of the act.

The identity of the old Eastern District and the court thereof could easily have been preserved in all of the proceedings in this case by designating the court and the district as "The United States District Court for the Eastern District of Oklahoma as it existed immediately prior to the passage of the Act of February 16, 1925," and all process issued out of that court could have been served by the marshal of the old Eastern District in any part of that district, including the ten counties which are not now within the territorial limits of the new Eastern District. Every safeguard of the Constitution and the statutes would have been preserved for the defendants and the Government would not have been inconvenienced or hampered in the least in the prosecution, and both the letter and the spirit of the law would have been respected and fulfilled. As it is, the defendants have been indicted and tried in the court for the new Eastern District of Oklahoma, which has no power or authority or jurisdiction to summon grand or petit jurors from the ten counties in the immediate vicinity of the place where the offenses are alleged to have been committed. They were tried at Ardmore, Oklahoma, in the extreme southern part of the state, before a jury drawn and selected from the immediate vicinity of Ardmore, some two hundred miles from the place where the offense was committed.

The Supreme Court of the United States in *Coe* v. *The State of Minnesota*, 76 U. S. 35, 19 L. ed. 573, 9 Wall. 35-

38, in construing a provision of the Constitution of Minnesota which is in the identical language of the Sixth Amendment of the United States Constitution, except that the word "county" is used therein instead of the word "state," said:

> "Undoubtedly, the provision securing to the accused a public trial within the county or district in which the offense is committed, is of the highest importance. It prevents the possibility of sending him for trial to a remote district at a distance from friends, among strangers and perhaps parties animated by prejudices of a personal or partisan character."

We remind the court, in this connection, that in the verified motion to quash the indictment in this case (Rec. 83) and in the verified motion to quash the petit jury panel from which the jury was selected to try the plaintiffs in error at Ardmore (Rec. 131), it is alleged that during the last three years preceding, there had been many bank failures, both state and national, in the territorial jurisdiction of the new Eastern District and that a great number of citizens therein had sustained losses, either as depositors or stockholders, and that because of said bank failures and said losses there existed in the minds and consciences of many citizens in the counties from which the jury was drawn, a bias and prejudice against officers of banks and other individuals charged with violation of the state and national banking laws, and that the defendants believed, and charged, that many of the citizens whose names were in the jury box at the time said grand and petit juries were drawn, had sustained financial losses, either as depositors or stockholders in national or state banks and that by reason thereof, were biased and prejudiced against any person charged with violation of said national or state banking laws. *These facts were admitted by the Government's de-*

murrer to the motion to quash the petit jury panel, which the trial court sustained (Rec. 131, 134, 135); and we also call the court's attention, in this connection, to the fact that the *voir dire* examination of the jurors called for service in this case shows that this condition existed and that the defendants were forced to exercise all of their peremptory challenges to relieve the jury of jurors whose minds were tinged and colored adversely to the defendants because of these conditions and that the defendants were left even then with certain members of the trial jury who were laboring under the unfavorable influence of these conditions. (Rec. 140 to 210.)

It was the possibility, yea, the probability, of such things being done that caused Patrick Henry to say in his speech before the Virginia convention on the adoption of the Federal Constitution on June 14, 1788, referring to the Constitution before the first ten amendments thereto had been adopted, that:

> "That paper tells you that the trial of crimes shall be by jury and held in the state where the crime shall have been committed. Under this extensive provision, they may proceed in a manner extremely dangerous to liberty; a person accused may be carried from one extremity of the state to another and be tried, not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the act, but, by a jury unacquainted with both, and who may be biased against him. Is not this sufficient to alarm men? How different is this from the immemorial practice of your British ancestors and your own! I need not tell you that, by the common law, a number of hundreders were required on a jury and that afterwards, it was sufficient if the jury came from the same county. With less than this, the people of England have never been satisfied. That paper ought to have declared the common law in force."

It was this objection on the part of Henry and others to section 2 of article 3 of the Constitution which caused the submission and adoption of the Sixth Amendment.

Until recent years, there has been a tendency, as we all know, on the part of the courts to drift away from the limitations and restrictions of the Constitution, and especially the Bill of Rights, but we have felt that in recent years, the pendulum has begun to swing in the other direction, and we find the courts, especially the Circuit Court of Appeals for the Eighth Circuit and the Supreme Court of the United States, vitalizing, by judicial construction, the provisions of the Constitution adopted in the beginning for the protection and preservation of the sacred rights of the American citizen guaranteed in the Bill of Rights. The courts are now seeking the purposes and reasons for these provisions of the Constitution and giving force and effect to them as intended by our forefathers, who fixed them as the fundamental law of the land.

There is a recent decision of the United States Circuit Court of Appeals for the Fifth Circuit, written by Circuit Judge WALKER and concurred in by Circuit Judges BRYAN and FOSTER, which calls for consideration in this petition for rehearing. It is *Quinlan* v. *United States*, 22 Fed. (2nd Series) 95. It construes the Sixth Amendment to the Constitution and section 59 of the Judicial Code. In that case, the accused was indicted in the court for the Middle District of Georgia for an offense committed in Bibb County, Georgia, before the Middle District of Georgia was created. Prior to May 28, 1926, the State of Georgia was divided into two federal judicial districts known as the Northern and Southern Districts of Georgia. Bibb County was then in the Southern District of Georgia. On May 28, 1926, Congress divided the State of

Georgia into three judicial districts, known as the Northern, Middle and Southern Districts of Georgia. Under this act, Bibb County is in the Middle District of Georgia.

The offenses charged in the indictment were committed in Bibb County in the early part of the year 1925, at a time when Bibb County was in the Southern District of Georgia and the indictment was found and returned on the 4th day of April, 1927, in the court for the Middle District of Georgia, in which Bibb County was at that time located. It was contended in that case that the conviction which followed was invalid because violative of the Sixth Amendment of the Constitution and also violative of the provisions of section 59 of the Judicial Code. The Circuit Court of Appeals for the Fifth Circuit in that case, held that the conviction was valid and was not violative of the Sixth Amendment or section 59 of the Code. It holds that the language "which district shall have been previously ascertained by law" refers to the time of trial and that section 59 of the Code refers only to prosecution pending in the old court at the time of the change and does not affect past offenses for which no indictment had been returned, leaving the venue for them in the new district having jurisdiction at the time of the indictment over the place where the offense was committed. The court, in discussing the Sixth Amendment, said:

> "The above quoted provisions of the Sixth Amendment, added to the requirement of the second section of article 3 of the Constitution in respect to crimes committed in the states, that the trial by a jury should be had in the state where the crime was committed, the further guaranty in respect to the place of trial, that the district should have been previously ascertained by law. That provision contains no requirement as to the court in which the accused is to be tried, or as to the district in

which the charged crime was committed remaining in existence until the time of the trial, or as it was when the crime was committed. That provision is consistent with the accused being tried by a court which was created after the commission of the crime and with the place of the commission of the crime being, at the time of the trial of the accused, in a district having territorial boundaries different from those of the district wherein the crime was committed."

We do not believe that this case correctly construes the Sixth Amendment. But if it does, then the court for the Northern District of Oklahoma is the proper court and the Northern District the proper venue for the indictment and trial of the plaintiffs in error in the instant case, because the offense was committed in Tulsa County, which, at the time of the indictment and trial, was within the territorial jurisdiction of the court for the Northern District. The plaintiffs in error were neither indicted nor tried in said court within the territorial jurisdiction of the Northern District.

In the *Quinlan* case, the court said, in regard to the source of the power and jurisdiction to indict and try the accused in the Middle District of Georgia, that:

"As to criminal cases begun in the District Court for the Middle District of Georgia, the power of that court within the territory of that district was conferred by the provision: 'The District Courts shall have original jurisdiction as follows: * * * *(2)* of all crimes and offenses cognizable under the authority of the United States.' Judicial Code, section 24, Par. 2 (28 U. S. C. A., section 41[2]). That power is not restricted to crimes and offenses committed within the territory of the district after it was created."

We think the court in the *Quinlan* case has overlooked or disregarded the object of the Sixth Amendment and the

purposes and reasons which caused its submission and adoption. However, there is one thing to be said in favor of that construction and that is, under the holding of the court in the *Quinlan* case, the indictment and trial of an accused must be found and had in the court and district having jurisdiction, at the time of the indictment and trial, over the territory where the offense was committed.

The plaintiffs in error in the instant case have been indicted and tried in a court and district that did not have jurisdiction, at the time of the indictment or trial, over the territory where the offenses are alleged to have been committed, to-wit: Tulsa County.

The Supreme Court in *Salinger* v. *Loisel*, 265 U. S. 224, 68 L. ed. 989, 997, held that:

> "It must be conceded that under the Sixth Amendment to the Constitution, the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district; and it also must be conceded that there is no authority for a removal to a district other than one in which the constitution permits the trial to be had."

In *United States* v. *Wood*, 28 Fed. Cases 755, Case No. 16757, there was involved the construction of the Act of Congress of April 20th, 1818, dividing the District of Pennsylvania into two districts, the Eastern and the Western Districts. Before the act was passed, a grand jury was drawn from the old District of Pennsylvania and was sworn and impaneled to inquire of offenses committed in the old District of Pennsylvania. The grand jury continued in session after the passage of the act dividing the district and thereafter found and returned an indictment against the defendant Wood. The offense was actually committed in the terri-

tory of the new Eastern District, but before its creation. The indictment alleged that it was committed in the District of Pennsylvania. The indictment was quashed because it did not allege the crime was committed in the Eastern District, and the court put its decision upon the ground that if the crime was committed in the Western District, the Eastern District had no jurisdiction but the Western court would have, and the indictment did not show on its face whether the offense was committed in what was then the Eastern District or the Western District. The court, in its opinion, said:

> "The second objection to the caption is that it states the presentment to be by the grand jury of the United States, inquiring for the District of Pennsylvania, when in truth there is no such district, and the jury had no power to inquire except for the Eastern District. The answer to this objection is that the caption is consistent with the truth of the case, and would, therefore, have been faulty had it been qualified as the prisoner's counsel has contended it ought to have been. The venire issued before the passage of the law in question to summon the grand jury for the District of Pennsylvania, and on the 11th of April, some days before the passage of this act into a law, they were sworn and affirmed to inquire for the body of the District of Pennsylvania. The indictment, therefore, is with strict propriety found by the grand inquest of the United States, inquiring for Pennsylvania District upon oath and affirmation, inasmuch as they were legally sworn and affirmed to inquire for the whole district. Nevertheless, there remains to be considered under this head a very interesting question, which is, does this indictment show that this court has jurisdiction of the offense charged to have been committed by the prisoner? This question resolves itself into two others. Although the grand jury were sworn and very properly to inquire for the District of Pennsylvania, yet could they, after the passage of this law, in-

quire of offenses committed on land out of the Eastern District of Pennsylvania? And, if they could not, then secondly, does the indictment sufficiently show that the offense of which the prisoner stands convicted was committed within the jurisdiction of the court? The court has not been able to find any act of Congress which in express terms fixes the jurisdiction of the Circuit Courts in criminal cases by the place in which the offense was committed. But the court is clearly of opinion, upon the fair and reasonable construction of the different laws upon this subject, that the jurisdiction of the Circuit Court in criminal cases is confined to offenses committed within the district for which those courts respectively sit, where they are committed on land. See the eleventh, twenty-third and twenty-ninth sections of the first judiciary act (1 Stat. 78, 85) and the third section of the act of the 2nd of March, 1793—2 Laws 225 (1 Stat. 333).

"It was contended by the district attorney that the jurisdiction of the Western District Court does not extend to criminal cases; but the court cannot give its assent to this construction of the law. The fourth section declares that that court, in addition to the ordinary jurisdiction of a District Court, shall, within the limits of the Western District, have jurisdiction of all causes, except appeals and writs of error, cognizable by law in a Circuit Court. Now, as it is clear that Circuit Court has jurisdiction of all offenses prohibited by the laws of the United States committed at sea or on land within the district where the court sits, it follows, from the general expressions above quoted, that the Western District Court has the cognizance of the offenses limited as to jurisdiction as the Circuit Courts are. If then, this court has not jurisdiction of offenses committed within the Western District, and the Western court has, the next question is, does this indictment sufficiently show that the offense of which the prisoner is convicted, was committed within the jurisdiction of this court? The allega-

tion in all the counts is that the offense was committed in the District of Pennsylvania. It might then have been committed as well in the Western as in the Eastern District, and the court cannot help the indictment in this respect by any presumptions, or because we know from the evidence that the offense was committed in this city. It is indispensable that the indictment should distinctly show that the court has jurisdiction of the offense and it ought, therefore, to have laid it to have been committed in the Eastern District."

It appears from the indictment in the instant case that the offense was committed in Tulsa County, which is in the territorial jurisdiction of the court for the Northern District of Oklahoma and is outside of the territorial jurisdiction of the court for the new Eastern District of Oklahoma.

In the *Woods* case, *supra*, the defendant was later indicted for the same offense in the Circuit Court for the Eastern District of Pennsylvania and there convicted. *United States* v. *Woods*, 28 Fed. Cases 754, Case No. 16756.

In *United States* v. *Maxon*, 26 Fed. Cases 1220, Case No. 15748. the defendant was indicted in the Circuit Court for the Eastern District of New York for an offense committed in the Southern District of New York before the Eastern District was established by the Act of February 25, 1865. The indictment was quashed because the Eastern District had not been ascertained by law previously to the commission of the offense and was, therefore, violative of the Sixth Amendment of the Constitution. Circuit Judge NELSON, in rendering the opinion, said:

"This question was somewhat discussed by counsel and court in *United States* v. *Dawson*, 15 Howard (56 U. S. 467), though the point was not necessarily involved. We think we hazard nothing in saying that the

above view of the amendment is in accordance with the general opinion of jurists, and the profession since its adoption and with the reasons that led to it."

In *United States* v. *Hackett*, 29 Fed. 848 and *United States* v. *Benson*, 31 Fed. 896, the Circuit Court for the District of California held that under the Act of August 5, 1886, dividing the State of California into two districts, known as the Northern and Southern Districts of California, the old district and the old court thereof were preserved and continued for the trial of past offenses the same as if the act had not been passed, and in the *Hackett* case, the court said:

> "It was necessary to keep alive the District Court of the District of California (the same observations applied to the Circuit Court) in order that a court might be organized and be in existence competent to call a jury from the body of the district where the crime was committed."

And,

> "The result is that the District Court for the District of California, and the Circuit Court for the District of California may continue to sit and summon jurors from the whole district for the purpose of trying those offenders. We are therefore of opinion that the course adopted, though anomalous and open to some inconvenience, is the only course to be adopted unless we are willing to say that all indictments pending in either court and all offenses committed before the passage of the act, must the one fail and be discontinued for want of jurisdiction and the other fail because the act secures the impunity of offenders."

We assert, therefore, that the court for the new Eastern District of Oklahoma cannot indict or try the plaintiffs in error for an offense committed in Tulsa County before the

passage of the Act of February 16, 1925, because: *(1)* Tulsa County is outside of the territorial jurisdiction of the court for the new Eastern District, and *(2)* the new Eastern District had not been ascertained by law at the time the offenses are alleged to have been committed.

We contend that the court for the Northern District of Oklahoma does not have jurisdiction to indict or try the plaintiffs in error for the offenses charged in the indictments to have been committed in Tulsa County, Oklahoma, before the passage of the Act of February 16, 1925, because: *(1)* the Northern District of Oklahoma had not been ascertained at the time the offenses are alleged to have been committed. However, if we lay aside and discard the reasons for the submission and adoption of the Sixth Amendment to the Constitution and look solely to the letter of the Sixth Amendment, a plausible argument can be made, as in the *Quinlan* case, that the court having jurisdiction over the place where the offense was committed at the time of the indictment and trial, is the proper court and proper venue for the prosecution.

The only theory that accords with both the letter and spirit of the Sixth Amendment is that the old Eastern District and the old court thereof is preserved and has exclusive jurisdiction to indict and try the plaintiffs in error for the offenses alleged to have been committed in this case, retaining full power and authority to summon and impanel grand juries and petit juries for the indictment and trial, from the uttermost limits of the old district, including the ten counties now in the Northern District of which Tulsa County is one, and with full power and authority to sit at Tulsa, now in the Northern District of Oklahoma, and to summon and

impanel the trial jury from the territorial limits of the second division of the old Eastern District. There is one thing that seems certain and conclusive to our minds and that is that the court for the new Eastern District cannot, under any theory of the law, be held to have jurisdiction in this case. The jurisdiction to indict and try in this case rests either in the old court of the old Eastern District or the court for the Northern District of Oklahoma.

The *Quinlan* case, *supra*, puts an entirely new construction on section 59 of the Judicial Code with reference to the meaning of "prosecutions" as used therein. It holds that that section refers only to prosecutions pending at the time of the change of the district and does not refer to offenses previously committed but not indicted. It bases this holding on the ruling of the Supreme Court in *Salinger* v. *Loisel*, 265 U. S. 224, 68 L. ed. 989, construing the word "prosecutions" as used in section 53 of the Judicial Code and also the same construction placed thereon by the Circuit Court of Appeals for the Eighth Circuit in *Biggerstaff* v. *United States*, 260 Fed. 926.

We quote at length from this decision at this point as follows:

> "It appears from the language of that section that, so far as it deals with the situation created by the establishment of a new district, the purpose was to make provision for such criminal and civil cases as, after the creation of the new district, properly could be begun in the District Court for that district. The provision as to civil cases, except as to the manner of transfer, is contained in the second sentence of the section. The language of that sentence unequivocally shows that the only cases it deals with in the event of the creation of a new district are civil actions pending at the time of the crea-

tion of such district. The language of the first sentence, so far as it deals with the matter of creating a new district, is consistent with it referring only to criminal cases pending when such district is created. The word 'prosecution' properly may be used to describe the proceedings after the indictment is found and returned. The connection in which the plural of that word is used in the first sentence of the section under consideration indicates that what was referred to was criminal cases pending at the time of the creation of the new district and then susceptible of being transferred. It has been authoritatively determined that the word 'prosecutions,' as used in section 53 of the Judicial Code (28 USCA, Par. 114) has the above indicated meaning. *Salinger* v. *Loisel*, 265 U. S. 224, 44 S. Ct. 519, 68 L. ed. 989; *Biggerstaff* v. *United States*, (C. C. A.) 260 F. 926.

"The provision of section 59, as to transfer of 'such prosecutions and actions' contained in its third sentence, indicates that the criminal cases referred to are those pending when the new district is created, with the result that the file of papers therein and all documents pertaining thereto are, at the time of the creation of the new district, outside thereof and susceptible of being transferred thereto. The enactment of some such provision as the above set out one as to criminal cases was necessary or appropriate as to cases pending when a new district is created, and was unnecessary as to cases thereafter brought. To say the least, it would be questionable whether, in the absence of a statute so providing, a court other than that for the new district would have or retain jurisdiction as to crimes committed in territory included in the new district. The provision was appropriate to enable such other court to proceed with cases pending in it when the new district was created, and which could not thereafter properly be begun in that court.

"As to criminal cases begun in the District Court for the Middle District of Georgia, the power of that court within the territory of that district was conferred

by the provision: 'The District Courts shall have original jurisdiction as follows: * * *. *Second.* Of all crimes and offenses cognizable under the authority of the United States.' Judicial Code, Chap. 24, Par. 2 (28 USCA, Chap. 41 (2)). That power is not restricted to crimes and offenses committed within the territory of the district after it was created. So far as section 59 of the Judicial Code is pertinent in the instant case, it provides as follows: 'Whenever any new district * * * has been or shall be established, * * * prosecutions for crimes and offenses committed within such district * * * shall be commenced and proceeded with the same as if such new district * * * had not been created, * * * unless the court, upon the application of the defendant, shall order the cause to be removed to the new district * * * for trial.'

"The provision for prosecutions being 'commenced and proceeded with the same as if such new district * * * had not been created, * * * unless,' etc., is similar to the provision of section 300 of the Judicial Code, (28 USCA, Chap 443; Comp. St., Chap. 1277): 'All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, amended, or repealed by this act, may be prosecuted and punished, or sued for and recovered, in the District Courts, in the same manner and with the same effect as if this act had not been passed.' That Code (section 289 (Comp. St., Chap. 1266)), abolished the Circuit Courts and conferred their jurisdiction on the District Courts. Section 300 referred both to cases brought in the Circuit Courts and cases not begun therein of which those courts had had exclusive jurisdiction. An effect of that provision was to enable the District Courts to proceed with cases pending in the Circuit Courts when the latter were abolished. As to criminal cases pending in the Circuit Courts when they were abolished, or of which those courts had exclusive jurisdiction, the provision of section 300 means that such cases may be dealt with by the District Courts as the

Circuit Courts could have dealt with them if those courts had remained in existence and retained their jurisdiction. Section 59 makes provision for criminal cases based on alleged crimes committed in territory detached from the district of the court in which those cases were brought. Section 300 makes provision for cases brought in abolished courts and for cases of which those courts had had exclusive jurisdiction.

"Considering the situations dealt with, it seems clear that in each instance, the requirement that the cases referred to be proceeded with as if the change effected by statute had not occurred was intended to foreclose the questions as to those cases remaining subject to be proceeded with, notwithstanding such change, and as to the court or courts in which they could be carried on to judgment. That the provision of section 59 as to prosecutions being begun and proceeded with as if the new district had not been created meant merely that jurisdiction of those cases was to be retained by the court in which they were begun, and not that the disposition to be made of those cases was to be entirely unaffected by the creation of the new district, is quite manifest, as that section itself provides for the transfer of such cases to the court for the new district, which, of course, could not have been done if that district had not been created. As section 59 deals with the situation created by transferring part of territory of an existing district to a newly created one, it well may be inferred that the language of the first sentence of that section, similar to that used in section 300, means that, as to criminal cases pending in the court of the old district when the new district is created, based on charges of crimes committed in the transferred territory, those cases may be proceeded with in the court in which they were instituted, the same as if the new district had not been created, though the places where the charged crimes were committed are no longer within the territorial jurisdiction of that court.

"An effect of the provision is to enable the court for the old district to retain jurisdiction of pending criminal cases which properly could not be begun in that court after the creation of the new district. We conclude that that provision does not refer to cases not begun until after a new district was created, and is without effect on the power of jurisdiction of the District Court of the Middle District of Georgia with respect to criminal cases begun therein, whether the crimes charged in those cases were committed before or after the creation of that district."

We do not agree with the reasoning of the court on this point and believe its conclusion is not supported by the cases of *Salinger* v. *Loisel, supra,* and *Biggerstaff* v. *United States, supra.* The language of section 53 of the Judicial Code there construed is:

"All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district."

The language of section 59, in so far as applicable here, is as follows:

"Whenever any new district or division has been, or shall be established, or any county or territory has been, or shall be, transferred from one district or division to another district or division prosecutions for crimes and offenses committed within such district, division, county or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial."

In section 53, it is said:

> "All prosecutions for crimes or offenses shall be had, etc."

Whereas, the language in section 59 is:

> "Prosecutions for crimes and offenses shall be commenced and proceeded with * * *."

There is a very marked distinction in the language used. The language in section 59 is more nearly like the language used in the Act of Congress of July 12, 1894, regarding the procedure in criminal causes in the District of Minnesota, wherein it is provided in section 1 that:

> "All criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the District of Minnesota, shall be brought, had and prosecuted in the division or district in which such offenses were committed."

This language of the Act of July 12, 1894, was construed by the Supreme Court in *Post* v. *United States*, 161 U. S. 583, 40 L. ed. 816. In that case, the defendant was indicted on July 20, 1894, at St. Paul in the third division of the district, for an offense committed on February 3, 1894, at Duluth in the fifth division of the district. In other words, the defendant was indicted after the Act of July 12, 1894, took effect, in a division of the district wherein the offense had not been committed. The Supreme Court reversed the conviction, holding that the defendant could not be indicted in any division of the district except the one in which the offense was committed. The Supreme Court, in *Salinger* v. *Loisel*, *supra*, recognized this distinction in the language used in these two sections when it said:

"The appellant relies on *Post* v. *U. S.*, 161 U. S. 583, 40 L. ed. 816, 16 Supreme Court Reports 611, as making for the contrary conclusion, but it does not do so. The case turned on a special statute now superseded, declaring that 'all criminal proceedings' for offenses in the District of Minnesota 'shall be brought, had and prosecuted' in the division in which the same were committed. The difference between that special direction and the general one now before us is so marked that further comment is not required."

A petition for writ of *certiorari* has been presented to the Supreme Court in the *Quinlan* case, and will no doubt be acted on soon.

The language of the Act of February 16, 1925, reserving in the old courts of the old districts jurisdiction to prosecute for past offenses, is to all intents and purposes the same as the language of section 59 of the Judicial Code. The language of section 5 of the act is:

"The jurisdiction and authority of the courts and officers * * * of the Eastern District of Oklahoma as heretofore divided between them by the order of the Senior Judge of the Circuit Court of Appeals for the Eighth Circuit of the United States, over the territory embraced within said Northern District of Oklahoma, shall continue as heretofore until the organization of the District Court of said Northern District and thereupon shall cease and determine, save and except * * * as to the authority expressly conferred by law on said courts, judges or officers, or any of them, *to commence and proceed with the prosecution of crimes and offenses committed therein prior to the establishment of the said Northern District.*"

The language of section 59 of the Code is as follows:

"Whenever any new district or division has been, or shall be, established, or any county or territory has

been, or shall be, transferred from one district or division to another district or division, *prosecution for crimes and offenses committed within such district, division, county or territory prior to such transfer, shall be commenced and proceeded* with the same as if such new district or division had not been created or county, division or territory had not been transferred."

If section 59 of the Judicial Code is construed to refer to only pending prosecutions, then the Act of February 16, 1925, must be construed to refer to only pending prosecutions, and jurisdiction to indict for offenses committed prior to February 16, 1925, would vest thereafter in the court of the district wherein the offenses were committed under section 24 of the Judicial Code and also under section 2 of the Act of February 16, 1925, which provides:

"Each of said judges and courts shall, in all other respects, have all of the power and authority, civil, criminal, equitable or otherwise, which is conferred by law generally upon the District Courts of the United States and the judges thereof."

It is certainly true that the court for the new Eastern District could not acquire, under section 24 of the Judicial Code, jurisdiction or authority to indict for an offense committed in Tulsa County prior to February 16, 1925, because Tulsa County is outside of the territorial limits of that court's jurisdiction, and yet the indictment in this case was returned in the court for the new Eastern District on June 23, 1925, several months after the passage of the Act of February 16, 1925, and several months after the organization of the court for the Northern District of Oklahoma, which took place on April 1st, 1925. We ask the court to keep in mind the distinction between indictment for an offense and trial of the

accused for the offense on the indictment after it is returned, because this court in its opinion has, it seems to us, lightly cast aside the objections we have raised to the jurisdiction of the court for the new Eastern District to indict the plaintiffs in error, by saying:

> "Authority was conferred upon the District Court of the Eastern District—that district having had jurisdiction of the offense when committed—to try the case in the absence of application for such transfer. No such application was made."

The plaintiffs in error moved to quash the indictment in this cause because the court for the new Eastern District of Oklahoma, in which the indictment was returned, did not have jurisdiction over the offense. Later on in the progress of the proceeding, we objected to the jurisdiction of the court for the new Eastern District to try the accused on the indictment. We did not move to transfer to the Northern District because it has been our contention from the inception of this case that we were indicted in a court that did not have jurisdiction over the offense and were being brought to trial in a court that had no jurisdiction to try the accused. To make our contention as plain as possible, let's assume that the plaintiffs in error had been indicted in the Western District of Arkansas or in the Western District of Oklahoma, would the court say for a moment that the failure of the accused to move to transfer to the Northern District of Oklahoma, waived the lack of jurisdiction on the part of the court in which the indictment was returned and operated to vest in that court jurisdiction which it does not have under the statutes of the United States? Jurisdiction cannot be conferred by consent and if the court for the new Eastern District of Oklahoma did not have jurisdiction to indict for the

offenses charged in this case, that court could not acquire jurisdiction to try the offenses through the failure of the accused to ask for a transfer to the court that does have jurisdiction. On June 23, 1925, the court having jurisdiction to indict the plaintiffs in error was either the court for the old Eastern District or the court for the Northern District of Oklahoma, depending upon whether section 59 of the Judicial Code and section 5 of the Act of February 16, 1925, reserved jurisdiction in the court for the old district for only the prosecution of offenses already indicted in that court, or for both indictment and prosecution, where the offense was committed prior to February 16, 1925. Certainly, the court for the *new* Eastern District at that time did not have jurisdiction to indict or try the accused for the offense charged, and all the proceedings therein are null and void and that court could not acquire jurisdiction through the consent of the accused any more than the accused could, by consent, give jurisdiction to one of the United States courts of New York.

We ask the court to refer at this point to the insert maps found in the back of our reply brief in this case, where it will be seen that the Northern District does not contain fourteen counties of the second division of the old Eastern District but only includes five counties from that division. It does not contain sixteen counties of the first division of the old Eastern District, but only includes five counties of that division and it would have been impossible, if this case had been transferred to the Northern District, for us to have secured in the Northern District any jurors from the fourteen counties of the second division or the sixteen counties of the first division of the old Eastern District which were not included in the Northern District.

The accused were entitled to have the indictment returned against them in a court having jurisdiction to summon and impanel a grand jury from any and every part of the territory constituting the district at the time the offense was committed and they are entitled to a trial on the merits in a court having jurisdiction and power to summon a petit jury from any and every part of the district as it existed at the time the offense was committed. The provision of section 277 of the Judicial Code that the court may order a grand or petit jury returned from such parts of the district as the court may direct so as to be most favorable to an impartial trial and so as not to incur any unnecessary expense or unduly burden the citizens from any part of the district with such service, pre-supposes the existence in that court of jurisdiction and power to direct the drawing of the jury from *any* part of the district. The accused were indicted and tried in the court for the new Eastern District of Oklahoma and it is conceded by the Government, and held by this court in *Lewis* v. *United States*, 14 Fed. (2nd Series) 369, that that court has no power to summon jurors from the ten counties including Tulsa, where the offenses are alleged to have been committed, which are not in the new Eastern District, but were in the old Eastern District. What would have been the situation if the court for the new Eastern District had determined as an uncontroverted fact that returning the grand jury or the petit jury in this case from Tulsa County, or any one of the other nine counties of the old Eastern District which are not in the new Eastern District, would be most favorable to an impartial trial and would not incur an unnecessary expense or unduly burden the citizens of that part of the district with such service? The accused would have been in a court and, in fact, were in a court which did not have the jurisdiction or power

to give them what they were entitled to under section 277 of the Judicial Code.

The court, in its opinion, says that:

> "The judge of the Eastern District before the passage of the Act of February 16, 1925, by general order, directed the names of jurors from the ten transferred counties to be removed from the jury boxes for the Eastern District, thereby, in effect, restricting the drawing of jurors to the counties remaining in the district."

This statement of the court is erroneous. No such order was ever made. The Government in its brief in this case concedes this when it says, on page 9:

> "Shortly after the passage of the act detaching the County of Tulsa from the Eastern District and prior to the drawing of the grand jury that indicted the defendants, Judge R. L. WILLIAMS, of the Eastern District, caused the names of all jurors residing in the ten detached counties to be withdrawn from the jury box of the Eastern District. This was a verbal order made to the clerk of the court in the presence of the United States attorney signing this brief and at his request, to the end that all grand and petit jurors should thereafter be summoned exclusively from the thirty remaining counties in the Eastern District."

As a matter of fact, the record does not show that any such verbal order was ever given. It merely shows from the testimony of the clerk that *there is no order of record directing the withdrawal from the jury box of the names from these ten counties*. The clerk testified that these names were withdrawn from the jury box in order to constitute a legal jury box *for the new Eastern District*.

An order of court must be entered of record to be valid and all orders not entered of record are extra-judicial and

void. 15 Corpus Juris 971; *Charleston Trust Company* v. *Todd*, (West Virginia) 131 S. E. 638; *State* v. *Marionneaux*, 45 So. 389; *Medlan* v. *Platte County*, 8 Mo. 235, 40 Am. Dec. 135.

In 15 Corpus Juris 971, it is said:

> "All orders of court not entered of record are extra-judicial and void."

In *Charleston Trust Company* v. *Todd, supra*, the Supreme Court of Appeals of West Virginia held that:

> "A court must speak by its records or not at all. To be effective, it must be a verity in itself."

In *Medlan* v. *Platte County, supra*, the Supreme Court of Missouri held that:

> "The testimony of a judge that the court verbally ordered an act to be done is inadmissible; the records of the court are the evidence of its official acts."

The only order with reference to the drawing of the grand jury panel was made by Judge WILLIAMS at Muskogee on May 30, 1925, *in the court of the new Eastern District* in the following language:

> "It is ordered that the jury commissioner and the clerk of the court draw 23 grand jurors and 3 alternate grand jurors to appear at Muskogee on June 22, 1925, at 9 A. M." (Rec. 103.)

The grand jury that returned the indictment in this case was obtained under this drawing and the drawing was made from the jury box after it had been deleted of all names of jurors from the ten counties of the old Eastern District which are not now in the new Eastern District and the grand jury that returned this indictment, at the same time, on June 23,

1925, found and returned fourteen other indictments, nine of which were for offenses committed since the 16th day of February, 1925, and the other five were for offenses committed prior to February 16, 1925, all of which indictments were returned into the same court at the same time and proceeded with by the same court in the same district, which was the new Eastern District and the court thereof, the same as if there was no difference or distinction between the new and the old Eastern Districts or the courts thereof.

The court has not mentioned or answered our objection to the indictment that the grand jury was not publicly but secretly drawn. That objection alone, we contend, is sufficient to avoid the indictment.

The order for the drawing of the petit jury panel was made by Judge R. L. Williams at Muskogee, Oklahoma, on December 2, 1925, in the court for the new Eastern District in the following language:

> "It is ordered by the court that the clerk and jury commissioner of this court draw the names of thirty persons from the jury box for petit jurors, to appear at Ardmore, Oklahoma, on January 18, 1926, at 9:00 of said date." (Rec. 133.)

The petit jury that returned the verdict of guilty in this case was obtained partly under this drawing from the jury box after it had been deleted of all names of jurors from the ten counties of the old Eastern District which are not in the new Eastern District. When the regular panel was exhausted, the court ordered an open venire to the marshal to summon twenty men from the body of the district. (Rec. 176, 177.) The trial jury, as finally constituted, was composed of five jurors out of the regular panel and seven jurors out of

the open venire. All of the jurors were from the vicinity of Ardmore in the new Eastern District and none of them were from any of the ten counties of the old Eastern District which are not now in the new Eastern District.

All of these orders for the drawing of the jurors were made by the court for the new Eastern District and the jurors were drawn from the jury box for the new Eastern District, except those obtained under the open venire, who were summoned by the marshal from the counties in the new Eastern District in the vicinity of Ardmore. These orders could not be considered as orders made by the court of the old Eastern District, but if they were so considered, their effect, under the authority of *May* v. *United States*, 199 Fed. 53 (8th Circuit), would be to require the panel to be drawn from the whole body of the old Eastern District and this was not done.

The court says in its opinion in the instant case:

> "We hold that section 59 of the Judicial Code hereinabove set out has express application here, in that it provides for a trial in the district from which counties have been transferred in the same manner as if such counties had not been transferred, unless upon application of the defendant, the court should order the cause to be removed to the new district for trial; *provided*, of course, that the offense was committed in one of the counties so transferred to the new district."

That means that the trial must be had in the district *from* which counties have been transferred in the same manner as if such counties had not been transferred. It cannot and does not mean that the trial must be had in the district *remaining* after the counties had been transferred or in the district *to* which the counties had been transferred. What about the indictment? This court makes no reference to the

indictment, although its validity was properly challenged by motion to quash for want of jurisdiction and because the grand jury was not publicly drawn. The accused objected to the jurisdiction of the court for the new Eastern District to indict and also to its jurisdiction to try this case. If the Act of February 16, 1925, had not been passed, the court for the old Eastern District would have had power and jurisdiction to summon grand and petit jurors from any or all of the counties in the district as it then existed and could have sat and held court at Tulsa, in Tulsa County, where the offense was committed, which is the place fixed by the division order of Judge SANBORN for the trial of the case as held in *Case* v. *United States*, 14 Fed. (2nd Series) 510. Section 59 of the Code gives the accused the option of being tried either in the court for the old Eastern District, with all of the power and jurisdiction it had before the act was passed, or in the court for the Northern District, as the same now exists, and yet this court has forced the accused to accept an indictment found in the court of the new Eastern District and to be tried in that court, which cannot summon jurors, grand or petit, from the ten counties of the old Eastern District, and cannot sit or hold a term of court at Tulsa, where the offense was committed.

The court further says in its opinion:

> "Upon the organization of the Northern District of Oklahoma, the divisional order of the Senior Circuit Judge ceased and terminated, except in so far as the authority of the Junior Judge of the Eastern District was continued in him as judge of said Northern District and except as to authority expressly conferred by law on said courts, judges or officers or any of them, to commence and proceed with the prosecution of crimes and offenses committed therein prior to the establishment of said North-

ern District. This conferred upon the plaintiffs in error the right to have this case tried at Tulsa in the present Northern District, if upon their application, the court should order the case to be removed to the Northern District for trial."

It must be conceded that as to past offenses, the divisional order of Judge SANBORN did not cease or terminate, but continued in full force and effect as law because it was confirmed and approved by Congress in the Act of February 16, 1925, as held by this court in *Case* v. *United States*, 14 Fed. (2nd Series) 510. This divisional order fixed the place of trial of the offense in this case at Tulsa, in the second division of the old Eastern District and this court held in *Case* v. *United States, supra*, that the *place* of trial under said divisional order and Act of Congress was jurisdictional and discharged the accused under a writ of *habeas corpus* because he was convicted at a different place, in a different division of the district and before a different judge than the one to whom the case had been assigned by the division order. This division order also provides that the functions of the court in passing on law questions and in the trial of criminal cases on *motions, demurrers* and pleas, shall be exercised in the division in which the offense is charged to have been committed. This division order, therefore, just as firmly fixed the *place for ruling* on the motion to dismiss, the motion to quash the indictment and the demurrer to the indictment, as it fixed the place of trial on the merits, and the one is just as much jurisdictional as the other, and yet this court has held by its affirmance of this case that Judge KENNAMER had jurisdiction to rule on the motion to dismiss, the motion to quash the indictment and the demurrer, at Muskogee in the first division of the district, when Judge SANBORN's division order juris-

dictionally fixed the place for the exercise of these functions at Tulsa in the second division of the district, and this court by its affirmance, has held that the accused could be tried at Ardmore, when the SANBORN division order jurisdictionally fixed the place of trial at Tulsa.

Can it be contended successfully that because under section 59 of the Judicial Code and Section 5 of the Act of Congress of February 16, 1925, the plaintiffs in error are given the right to a trial in the court of the Northern District of Oklahoma upon their application, they are thereby denied the right to insist that they cannot be indicted in a court which does not have jurisdiction over the place where the offense was committed and are thereby denied the right to insist upon a trial in a court which has jurisdiction to summon jurors from any and every part of the district as it existed at the time the offense was committed? This court has held, in effect, by its affirmance of this case, that because the accused did not move to transfer to the Northern District, they can be indicted and tried over their timely objection in the court of the new Eastern District, which does not have jurisdiction over, or power to summon grand or petit jurors from, the county and vicinity in which the offense was committed; that by failing to move to transfer from the court of the new Eastern District to the court of the Northern District, plaintiffs in error waived their right to insist upon indictment and trial in the court for the old Eastern District, and thereby conferred, by consent, upon the court for the new Eastern District, jurisdiction to indict and try them, although that court did not have jurisdiction under any Act of Congress and could not be invested with such jurisdiction in the face of the Sixth Amendment to the Constitution.

Consent cannot give jurisdiction to courts of the United States.

—*Wick* v. *United States*, 290 Fed. 191 (Eighth Circuit);
Railway Company v. *Ramsey*, 22 Wall. 322, 327, 22 L. ed. 823, 824;
Exporters v. *Butterworth, Judson & Co.*, 258 U. S. 365, 66 L. ed. 663;
Graves v. *Corbin*, 132 U. S. 571, 33 L. ed. 462.

Courts of the United States, other than the Supreme Court, have only such jurisdiction as Congress has specifically conferred upon them and it is very clear that Congress has, under section 59 of the Judicial Code and section 5 of the Act of February 16, 1925, withheld jurisdiction from the court for the new Eastern District of Oklahoma in the prosecution of offenses committed prior to February 16, 1925, and has specifically retained jurisdiction for that purpose in the court of the old district as it existed at the time the offenses were committed. Neither section 59 of the Code, nor section 5 of the act is susceptible of any other construction.

When it is conceded as this court has conceded, and specifically held, that the court for the new Eastern District has no jurisdiction over the territory embraced in the ten counties of the old Eastern District, where the crime is alleged to have been committed, which are not now in the new Eastern District and has no power or jurisdiction to summon jurors from any of said ten counties, it necessarily follows that the court for the new Eastern District is an entirely separate and distinct court from that of the old Eastern District, because it must be conceded that if the change had not been made by the Act of February 16, 1925, the court of the old Eastern District did have jurisdiction and could summon ju-

rors therefrom. The two courts cannot be the same and at the same time have different territorial jurisdiction.

A court cannot function outside of its territorial jurisdiction, *Rosencrans* v. *United States*, 165 U. S. 257, 41 L. ed. 708, and the court for the new Eastern District cannot sit at Tulsa, which is outside of the territorial limits of the new Eastern District, and yet if the Act of February 16, 1925, had not been passed, the court for the old Eastern District could sit at Tulsa, where the division order of Judge SANBORN jurisdictionally fixed the place for the trial of offenses committed in Tulsa County.

Jurisdiction over the person may be conferred by consent, but jurisdiction over the subject-matter cannot be conferred by consent. In the case at bar, the court for the new Eastern District had no jurisdiction over the subject-matter—the offense which was committed outside of its territorial jurisdiction.

The grand jury is inseparably connected with, and a part of, the court in which it functions and its jurisdiction is co-extensive with, and limited by, that of the court in which it is empaneled and for which it is to make inquiry.

—28 Corpus Juris, section 88, page 797;

United States v. *Hill*, 26 Fed. Cases 315, Case No. 15,364;

Logan v. *United States*, 144 U. S. 263, 36 L. ed. 429.

A grand jury is a local tribunal and cannot inquire into offenses committed outside of its jurisdiction. (See cases cited in Note 86, at page 797 of 28 Corpus Juris.) In the case at bar, the grand jury that returned the indictment was empaneled in, and for, the court for the new Eastern District of Oklahoma, on June 22, 1925, several months after the Act

of February 16, 1925, took effect and after the court for the Northern District of Oklahoma had been organized on April 1st, 1925. At the same time it returned the indictment in this case, it returned other indictments for offenses committed in the new Eastern District since its creation, and it is conceded by the Government to have been a grand jury empaneled in and for the court of the new Eastern District, as it now exists.

We, therefore, submit that the only theory upon which the Sixth Amendment to the Constitution, section 59 of the Judicial Code and the Act of February 16, 1925, can be harmonized, is to hold, as we have contended, that the new Eastern District is not the same as the old Eastern District, but has a separate and distinct identity; that the court for the new Eastern District is not the same as the court for the old Eastern District, but has a separate and distinct identity and existence, without the same jurisdiction, without the same judges and without the limitations and restrictions of the division order of Judge Sanborn which was approved and confirmed by Congress as to offenses committed before February 16, 1925; that the court for the old Eastern District, and the old Eastern District itself, are preserved and their jurisdiction reserved for the indictment and trial of offenses committed before the passage of the Act of February 16, 1925. That the court for the old district may, and should, continue to sit and exercise its jurisdiction as to past offenses at such places as the old law provided and with full and complete jurisdiction under the old law, over the territory where this offense was committed, with full power and jurisdiction to try the accused at Tulsa in the second division of the old Eastern District, and with full power and jurisdiction to summon

jurors, both grand and petit, from any part of the old Eastern District that the court might determine would be most favorable to an impartial trial, without incurring an unnecessary expense or unduly burdening the citizens of that part of the district with such service. It would be a paradox to say that under section 277 of the Judicial Code, the court may order the jury drawn from any part of the district and then in the same breath say that the court has no jurisdiction or power to summon jurors from a certain part of that district. Yet, that is the effect of this court's affirmance of this case.

IV.

We insist that the court has misconstrued the meaning of the word "entry" and the word "book" as used in section 5209 of the statute. The construction we have contended for is supported by the decisions we cited in our original brief and by the contemporaneous construction of the Department of the Government having jurisdiction over the administration of the National Banking Laws and over the prosecution of offenses against those laws continued for more than sixty-four years, but we have said all that we can say and have cited all of the authorities that we can find bearing upon that question, and, therefore, can say nothing in this petition for rehearing that has not already been said.

V.

We likewise insist that this court has erred in holding that the evidence is sufficient to sustain the conviction under the last three counts of the indictment charging false entries in certain reports to the comptroller of the currency. On this subject, we desire to cite, in addition to the authorities con-

tained in our original brief, the case of *Hyde* v. *United States*, 15 Fed. (2nd Series) 816, decided by the Circuit Court of Appeals for the Fourth Circuit on October 19, 1926.

We respectfully urge upon the court a reconsideration of this case, including a re-examination of our original brief and especially our reply brief in the light of what has been said in this petition for rehearing, and in connection with it, and we most earnestly and respectfully ask this court to correct the erroneous statements in its opinion which we have called the court's attention to. If this court, on rehearing, affirms the conviction in the court below, and we should desire to take the case to the Supreme Court of the United States, we do not want to be embarrassed or handicapped in that court by being forced to contend and insist there that this court's opinion contains erroneous statements as to the record in the case.

We take it that there is but little question but what the Supreme Court will grant the writ of *certiorari* in the *Quinlan* case and will there construe in the near future, the meaning of the Sixth Amendment and section 59 of the Judicial Code. However, in that case, the distinction between the new Southern District of Georgia and the old Southern District, and the distinction between the court of the new Southern District and that of the old Southern District may not be drawn or passed on, because not involved or material in that case. If, however, the Supreme Court in that case gives the subject a thorough consideration and passes therein on the questions involved here before this court rules on this petition for rehearing, we shall ask leave of court to supplement this argument by discussion of the Supreme Court's opinion in that case.

The plaintiffs in error request the court for an oral argument on this petition for rehearing and that the court make an order allowing same.

Respectfully submitted,

R. L. Davidson,
W. I. Williams,
Attorneys for Plaintiffs in Error.

The undersigned counsel of record for plaintiffs in error hereby certify that the foregoing petition for rehearing is made in good faith and that they honestly and firmly believe it is well taken and that the relief asked for should be granted.

R. L. Davidson,
W. I. Williams,
Attorneys for Plaintiffs in Error.

(Endorsed): Filed in U.S. Circuit Court of Appeals, Jan. 24, 1938.

984 (Opinion on Motion for Rehearing.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, A. D. 1928.

Allie E. Lewis and William Lloyd Lewis, Plaintiffs in Error,
No. 7492. vs.
United States of America, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Oklahoma.

On Motion for Rehearing.

Before Stone and Van Valkenburgh, Circuit Judges.

Per Curiam:

After careful consideration of the matters presented in the petition for rehearing we adhere to the conclusions announced in the opinion filed to which that petition is addressed. It appears, however, that through similarity of situations, the decision of this court in Lewis, et al vs. United States, 14 Fed. (2d) 369, was treated as having been rendered in the instant case. It is now brought to our attention that this was a misconception, which the arguments of counsel at the hearing failed to remove. The opinion, therefore, should be, and hereby is, modified in that particular. However, Lewis, et al vs. United States, (14 Fed. (2d) 369) was referred to, not as declaring the law of this case, but as announcing principles which we regarded, and still regard, as convincing and decisive of certain of the issues before
985 us. Therefore, the modification now made in nowise affects the ultimate conclusion reached. The rehearing prayed is accordingly denied.

Filed May 7, 1928.

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986 (Order denying Petition for Rehearing.)

May Term, 1928.

Monday, May 7, 1928.

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for Plaintiffs in Error.

On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

May 7, 1928.

(Motion to Stay Issuance of Mandate.)

The plaintiffs in error, Allie E. Lewis and William Lloyd Lewis, who were defendants in the Court below, respectfully request the United States Circuit Court of Appeals for the Eighth Circuit to stay the mandate in the above styled cause pending the making of an application on their part to the Supreme Court of the United States for a writ of certiorari and pending proceedings in the Supreme Court to review the decision of the United States Circuit Court of Appeals for the Eighth Circuit in this case, and in that connection, they respectfully represent and show to the Court:

That they intend to proceed as rapidly as possible under the circumstances to apply to the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court in this cause; that they have heretofore furnished the Clerk of this Court the requisite number of extra
987 copies of the printed record and are, simultaneously with the filing of this motion, requesting the Clerk of this Court to certify a complete record of this cause in this Court and to have the requisite number of copies of said record printed under the supervision of the Clerk of this Court and have requested the Clerk of this Court for a statement of the costs of the certification and printing of said record. That as soon as certification of the transcript of the record and the printing thereof have been completed, they will proceed with dispatch to prepare and file with the Clerk of the Supreme Court of the United States, an application for a writ of certiorari and a brief in support thereof; that the defendants will deposit with the Clerk of this Court, as soon as notified, the deposit required to cover the cost of certifying and printing the record as requested.

R. L. DAVIDSON,
W. I. WILLIAMS,
Attorneys for Plaintiffs in Error.

State of Oklahoma,
County of Tulsa.

The affiant, R. L. Davidson, being first duly sworn, states under oath that he is one of the attorneys of record for the plaintiffs in error in the above styled cause; that he has been directed by the plaintiffs in error to proceed with dispatch to obtain a review of the decision of the Circuit Court of Appeals in the above styled cause through a writ of certiorari from the Supreme Court of the United States and that the statements contained in the foregoing motion are true; that

he believes in good faith that a writ of certiorari ought
988 to be allowed in this case by the Supreme Court and that the proceedings on the part of the plaintiffs in error to obtain such review are in good faith and will be prosecuted with due diligence.

R. L. DAVIDSON.

Sworn to and subscribed before me this the 10th day of May, 1928.

(Seal) BRADFORD J. WILLIAMS,
Notary Public.

My Commission Expires: April 2, 1932.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 12, 1928.

(Order Staying Issuance of Mandate.)

May Term, 1928.

Monday, May 14, 1928.

On Consideration of the motion of plaintiff in error, supported by affidavit, for a stay of the mandate in this case pending a petition to the Supreme Court of the United States for a writ of certorari, It is now here ordered by this Court that the issuance of the mandate herein, be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed and proof by affidavit of notice thereof under Paragraph 3 of Rule 35 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 14, 1928.

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989 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals of the Eighth Circuit do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared, printed and certified by the Clerk of said

District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Allie E. Lewis, et al., were Plaintiffs in Error and the United States of America was Defendant in Error, No. 7492, as full, true and complete as the orginals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fourth day of May, A. D., 1928.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

ORDER ALLOWING CERTIORARI—Filed October 8, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. The argument is to be limited to the question of jurisdiction and the determination whether the trial took place in accordance with the act of February 16, 1925, and section 59 of the Judicial Code, properly construed, and whether the right of petitioner under the Sixth Amendment to the Constitution was infringed thereby.